STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

TIFFANY LYNN REICHARD,

Defendant-Appellant.

Michigan Supreme Court No.:

Court of Appeals Docket No.: 340732

Jackson County Circuit Court No.: 16-005052-FC

JACKSON COUNTY PROSECUTOR
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DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

SERVED VIA TRUFILING

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ORDER APPEALED, RELIEF SOUGHT AND JURISDICTION OF THE COURT

This Court has jurisdiction under Const. 1963, Art 1, § 20; MCL 600.215(3); MCL 770.3(6); MCR 7.303(B)(1). Appellant seeks leave to appeal the April 17, 2018, published opinion of the Michigan Court of Appeals. Appellant's position is that, under MCR 7.305(B), the issue presented has significant public interest, the issue presented involves a legal principle of major significance to the state's jurisprudence, and the decision of the Court of Appeals is clearly erroneous and will cause material injustice.

THE QUESTION PRESENTED

ISSUE ONE

In a felony murder trial, when a violent man coerces a frightened woman into driving him to a home where, unbeknownst to her, he kills someone, a jury should be allowed to consider the duress defense. The rationale for the murder exception to the defense is that one cannot choose to take the life of another in order to save their own. Where there is no claim that the accused ever made a choice to knowingly help the principle kill or commit great bodily harm, the rationale for the exception does not exist and the exception should not apply. There is no principled reason to deny Ms. Reichard her state and federal Due Process Clause right to present a duress defense at her trial.

The Trial-Court answered: Yes.

Defendant-Appellant answers: Yes.

Plaintiff-Appellee answers: No.

The Court of Appeals answered: No.

INTRODUCTION

This case arises from a murder committed by Michael Beatty. The lead investigator has testified that Beatty is violent and controlling. He beat and sexually assaulted Reichard on many occasions. He coerced her into helping him *rob* – not kill – the victim. He ordered Reichard to drive him to the victim's home, knock on the door, then return to the car. While Reichard was sitting in the car as ordered, Beatty killed the victim inside the home.

Unlike the defendants in each case cited by the prosecution and Court of Appeals, no one claims that Reichard *knew* Beatty intended to commit murder or great bodily harm, or that *she* had that intent, or that she was *present* when the murder occurred. The circuit court held that the duress defense could be presented at Reichard's trial. The prosecution appealed and prevailed.

The rationale for the murder exception to the duress defense is that no one has a right to choose to kill an innocent person in order to save their own life. Reichard made no such choice, and where the rationale for the exception does not exist, the exception should not be applied. No principled reason exists to deny Reichard her right to a duress defense at her trial. Doing so hinders the goal of truth-seeking and the cause of justice, it invites perverse outcomes and jury confusion, it moves Michigan from being a leading state in this area of law to an outlier, as the trend in other states has been to allow the defense in felony murder cases where the accused did not *intend* or *participate in* the homicide.

"[D]uress is no defense to the intentional taking of life by the threatened person; but it is a defense to a killing done by another in the commission of some lesser felony participated in by the defendant under duress."[1] Michigan law should trust trial courts and juries to make these decisions rather than adopt the absolutist position that at least one member of the Court of Appeals – during oral argument – indicated was *required* until this Court speaks.

[1] LaFave, Substantive Criminal Law, Section 5.3(b) at 618 (West Publishing Company 1986)

STATEMENT OF FACTS

The Police Describe Beatty as Violent and Controlling

Beatty coerced Reichard into driving him to the victim's home for the purpose of a robbery and to then wait in the car; but once inside, Beatty killed the victim (Exam at 15-16). Reichard was not present and no one has claimed that she knew Beatty's intent (Exam at 71-73). Thereafter, Beatty reached-out to police through his mother.

The lead investigator, a 23-year veteran, testified:

> [Beatty's mother] gave me an exact date [Beatty] wanted me to interview him at the prison, but it had to be that date. So, at that point I didn't interview him. Knowing a little bit about [Beatty]'s history I did not want him to feel he was in control of the situation [Exam 31-32].

Asked, "And you found information confirming that [Beatty] was controlling and abusive towards Ms. Reichard," the lead investigator agreed (Exam 68-69, 73). The police twice asked Reichard (who has a child with Beatty) to submit to an interview and she twice complied and cooperated (Exam at 34-37).

Defendant Reichard Cooperated with Police

The lead investigator described Reichard as truthful:

> And eventually she gets [to] the point where she discusses that she was involved in planning the homicide. ***She said actually it was planning a robbery*** saying Beatty had talked about "hitting a lick" [doing a robbery] on Cramton [the victim] who he heard had money and drugs [Exam at 38, Emphasis added].

Reichard drove Beatty to Matthew Cramton's home; there was no talk of physically injuring Crampton (Exam at 39-41, 71-72, 77). Reichard knocked on Cramton's door and Beatty, masked and carrying what appeared to be a gun, rushed-in as Cramton answered; Reichard returned to the car as ordered *Id*. Nothing in the record suggests that Reichard saw the weapon until she and Beatty were already at Crampton's door. Beatty later returned to the car, bloodied, and Reichard complied with his order to drive and, initially, with his order to never discuss the incident *Id.* No gun was fired, and Beatty disposed of the knife he used. *Id.*

The Police Investigation

A sworn police-affidavit filed with the circuit court, Exhibit One, describes Beatty's past and his known modus operandi of enlisting accomplices through, "threats, intimidation, and physical violence" (Exhibit One at ¶¶ 9-10, 16, Exam at 77). The affidavit states that Reichard was enlisted in the Cramton robbery only because a Joshua Haire backed out at the last minute. *Id*. Not long before the Cramton robbery, Beatty had coerced Haire into helping him rob a man who he (Beatty) beat unconscious in the presence of Haire. *Id.*

The lead investigator testified that, when he asked Reichard why she did not come forward sooner, "Reichard said she was scared of [Beatty who] had assaulted her pretty severely in the past and she was worried about repercussions if she came forward" (Exam at 40-41). He testified, "Investigator Gross had some concerns that [Reichard] may be suicidal," and they discussed that with Reichard's step-mother. *Id.* The defense has retained an expert on domestic violence (*Defense Motion* at ¶ 4-6).

The Ruling, the Appeal, and the Opinion

The defense moved for permission to pursue a duress defense, acknowledging that the defense is not allowed when *the accused* commits the homicide (*Defense Motion* at ¶ 7-10, T. 9/14/17 Hrg. at 3, 6).[2] The defense said, "there's going to be testimony of [Reichard's] nose being broken, her being beaten repeatedly, sexually assaulted by Mr. Beatty, numerous years of abuse." *Id.* The prosecution called the subject, "amusing" (T. 9/14/17 Hrg. at 11).

The circuit court granted the motion, finding that barring the defense in this "extremely unique" case, "keeps a significant portion of what was going on from [the jury's] knowledge" (T. 9/14/17 Hrg. at 14). The prosecution pursued an interlocutory appeal and, on April 17, 2018, the Court of Appeals reversed in a published decision, Exhibit Two.

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[2] "Duress," is used synonymously with "coercion," "compulsion," and "intimidation." See 1A O'Malley et. al., Federal Jury Practice and Instructions: Criminal § 19.02, at 758-59, 765 (2000)

LAW AND ARGUMENT

ISSUE ONE

In a felony murder trial, when a violent man coerces a frightened woman into driving him to a home where, unbeknownst to her, he kills someone, a jury should be allowed to consider the duress defense. The rationale for the murder exception to the defense is that one cannot choose to take the life of another in order to save their own. Where there is no claim that the accused ever made a choice to knowingly help the principle kill or commit great bodily harm, the rationale for the exception does not exist and the exception should not apply. There is no principled reason to deny Ms. Reichard her state and federal Due Process Clause right to present a duress defense at her trial.

Standard of Review and Issue Preservation

The defense obtained a ruling that allowed it to present a duress defense. The prosecution filed an interlocutory appeal and obtained a reversal. The defense seeks leave on the only issue raised below. Questions of law are reviewed de novo.[3]

Discussion

The duress defense recognizes that even individuals who would otherwise obey the law might be forced to violate it if threatened with grave harm. If the defense is proven, punishment serves neither the deterrent or condemnatory purposes of the criminal justice system. The defense usually requires the accused to testify. This record is unusual in that the outlines of the defense appear in police testimony made at the preliminary examination.

I. The Duress Defense Addresses the Accused's Mental State and the Offense Elements.

To raise the duress defense, the defendant has the burden of producing, "some evidence" from which the jury could conclude the following:

> A) The threatening conduct [that occurred] was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
> D) The defendant committed the act to avoid the threatened harm.[4]

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[3] *People v. Armstrong,* 490 Mich 281; 806 NW2d 676 (2011)
[4] *People v. Lemons*, 454 Mich 234, 246–48; 562 NW2d 447, 453–54 (1997)

The duress defense, therefore, necessarily requires an examination of the accused's mental state at the time of the crime – their will or intent. If an offense is not a strict liability offense, the duress defense might be applied.

In the case *sub judice,* the charges include intent elements. Felony murder requires, "an intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result."[5] The predicate felony of armed robbery has a larceny element, so the prosecutor must show that defendant intended to permanently deprive the owner of property.[6]

The prosecution is required to prove each element of the predicate felony. The United States Supreme Court has held:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary to constitute the crime with which he is charged*.[7]

II. There Is No Principled Reason to Not Allow the Duress Defense Where the Accused Never Chose to Aid in the Commission of a Homicide.

The murder exception to the duress defense stems from a policy judgment that a person cannot value his own life more than an innocent person's and thus kill an innocent person to save his own life.[8] But Reichard never chose to kill anyone, and the prosecution does not argue that she knew of Beatty's intent to kill, so the rationale for the exception is inapplicable.[9] Extending the exception to unintentional felony murder, as the Court of Appeals Opinion has done, removes a classic jury

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[5] *People v. Smith,* 478 Mich 292, 318–319; 733 NW2d 351 (2007) (Emphasis added; Citation, quotation marks, and brackets omitted.)
[6] MCL 750.529, *People v. Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000)
[7] *In re Winship,* 397 US 358, 364 (1970) (Emphasis added). See also *United States v. Gaudin*, 515 US 506 (1995)
[8] William Blackstone, 2 Commentaries on the Laws of England (William Carey Jones ed. 1916)
[9] See e.g., *Hall v. Kelso*, 892 F2d 1541, 1546 n. 4 (11th Cir. 1990) (noting in dicta that the rationale "that one should sacrifice one's own life before killing or helping to kill an innocent victim, is inapplicable in the felony murder context.")

question from the jury, does not further the goal of truth-seeking or justice, and will result in unjust outcomes.

A. The Rationale for the Murder Exception to the Duress Defense is Missing.

Allowing Reichard's jury an opportunity to consider the duress defense does not in any sense convey the message that society condones the killing of innocent persons. Rather, it merely signifies a recognition that an individual who drives a car and waits outside, unaware of Beatty's intent to kill, and only after being threatened and coerced by Beatty, might not deserve the very same punishment as Beatty.[10]

B. Disallowing the Duress Defense Will Cause Perverse and Unjust Outcomes.

Under the Court of Appeals Opnion, the duress defense can relieve a coerced defendant of liability where they *chose* to intentionally cause *grievous bodily harm* in order to save their own life under duress, but would be unavailable to a coerced defendant who, like Reichard, intended *no* bodily harm on anyone.

The first defendant, with more blameworthy conduct, can go free while the second defendant, less in need of deterrence or punishment, would not be allowed to *argue* the duress defense to the jury. And the difference between the two cases is due only to the acts of a *third party* over whom the second defendant had no control. People like Beatty should not be given the power to convert Reichard's robbery conviction into a murder conviction.

Imagine two defendants with the exact same conduct, circumstances, and *mens rea*, who, under duress, cause the same grievous bodily harm to two different victims. If the first victim recovers, that defendant would have a complete defense, duress. If accepted by the jury, that defendant escapes criminal liability. If the second victim dies, however, the second defendant is barred from presenting the same defense. The dramatic difference between the two outcomes is not related to

[10] Mr. Beatty was found guilty of first-degree murder and sentenced to non-parolable life.

any difference in moral culpability.

The prosecution's position will inevitably lead to perverse and unjust outcomes and public distrust in the fairness of the criminal justice system. This is likely why the defense located cases in which (discussed below) Michigan trial courts allowed the duress defense in felony murder trial. We should listen to them.

C. The Court of Appeals Opinion Invites Jury Confusion.

Consider the thought process of a typical jury as they struggle to follow the court's instructions. Although not required, the prosecution will typically request a charge on the predicate felony when an accessory is charged with felony murder. That is done for a pragmatic reason; to ensure some liability should the jury acquit the accessory on the murder count, due to their lesser or more remote involvement.

If that jury finds the elements of duress were shown, they would be instructed to *acquit* on the predicate felony. They would then be instructed to *convict* on the felony murder count even if they found the killing occurred in furtherance of the underlying felony on which they just *acquitted* the defendant. The potential for jury confusion is one reason so many states, as discussed below, have rejected an absolutist rule.

D. Juries Can Be Trusted to Evaluate a Duress Defense.

Whether the accused acted under duress is the kind of fact-intensive judgment that should be given to the trier of fact and not withheld as a matter of law. A duress instruction will benefit few defendants. In criminal cases that end in a death, jurors are not overly receptive to any defense argument. There is no need to invade the province of the jury.

Juries can be trusted to make the correct decision after both sides are allowed to convey a full and accurate picture of what they contend happened. Allowing anything less does not further the truth-seeking goal of the trial. The prosecution has yet to argue that the defendant's position harms that goal or that it will cause any injustice.

III. Allowing the Duress Defense is Consistent with *People v. Aaron*.

Before the Court of Appeals, the prosecution asserted that, "duress is not a defense to murder" and, with little explanation, that the position of the defense, "violates *People v. Aaron*."[11] A review of the audio recording of oral argument will show that at least one member of the Court expressed agreement regarding *Aaron*. The Opinion, however, does not cite *Aaron*. Nonetheless, the subject will be addressed.

To prove felony murder under an aiding and abetting theory, the prosecutor must establish that the defendant:

> (1) performed acts or gave encouragement that assisted in the commission of the killing of a human being, (2) did so with the mental state of malice, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony.[12]

There are three ways to prove malice under the *Aaron* decision:

- Show that the aider and abettor intended to kill;
- Show that the aider and abettor intended to cause great bodily harm, or
- Show that the aider and abettor wantonly and willfully disregarded the likelihood that the natural tendency of his behavior was to cause death or great bodily harm.[13]

The prosecution has never suggested that the facts in the case *sub judice* can support either of the first two forms of malice. The prosecution focuses on the third form of malice – "wanton and willful disregard." If the aider and abettor participates in a crime with knowledge of *the principal's* intent to kill or to cause great bodily harm, the aider and abettor has acted with 'wanton and willful disregard' sufficient to support a finding of malice.[14] Here too, the prosecution has never suggested that such evidence exists.

A jury may also infer the third form of malice, "from evidence that the defendant intentionally

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[11] *People v. Aaron*, 409 Mich 672; 299 NW2d 304 (1980)
[12] *People v. Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003) (Emphasis added)
[13] *Riley*, 468 Mich at 140–141
[14] *Id.*

set in motion a force likely to cause death or great bodily harm."[15] This is the prosecution's theory; that murder was a natural and probable consequence of Beatty's plan to commit a robbery. But it tortures language to state that a defendant who is genuinely acting under *duress*, is behaving in a *willful or wanton disregard* of the consequences of her actions.

The same facts that caused Reichard to cooperate with Beatty under duress – Beatty's violent nature – cannot be considered by the jury in support of a *defense* but can be used to show *malice* on the part of Reichard, i.e., that she knew what he was capable of. The injustice of that is obvious and it goes ignored in the Court of Appeal's decision.

In any event, how a duress instruction "violates Aaron" has never been explained. The defense rejects the suggestion. All three forms of malice center on the *intent* of the accused; as does the duress defense.[16] In the case of accessory liability, where the accessory had no knowledge of the principle's intent to kill or cause great bodily harm, the malice requirement *invites* a duress defense where supported at trial by a factual record.

IV. The Court of Appeals Opinion

The Court narrows the issue before it in a manner the defense cannot join. The Court cites cases in which the accused directly committed murder, but the holding the defense seeks would not apply to such cases. The Court recognizes the rationale for the murder exception, but not that the rationale does not apply to this record. The Court does not address the likelihood of perverse and unjust outcomes and jury confusion and fails to distinguish direct participation in a homicide from the far broader concept of 'aiding and abetting.' The Opinion ends in what the defense respectfully reads as circular reasoning. In fairness to the Court of Appeals, the issue was one of first impression never before meaningfully analyzed in Michigan case law.

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15 *People v. Carines,* 460 Mich 750, 759; 597 NW2d 130 (1999), *People v. Robinson,* 475 Mich 1, 9–13; 715 NW2d 44 (2006)

[16] *Riley,* 468 Mich at 140–141

A. The Opinion Errs in How It Narrows the Issue.

The duress defense should be allowed on the predicate felony (whether charged or uncharged) and thereby operate as a defense to felony murder. The predicate felony is an essential element of felony murder which the prosecution is required to prove beyond a reasonable doubt. In the words of former Justice Scalia, "…the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals."[17]

There is, however, no principled reason that duress could not serve as a defense to the *first* element of felony murder: That the accused *under duress*, "performed acts or gave encouragement that assisted in the commission of the killing of a human being."

Further, if either of the first two forms of malice are shown, the jury could not acquit the defendant based on a duress defense. But there is no principled reason that duress could not serve as a defense to the third form of malice: That the accused *under duress* acted in willful and wanton disregard of the consequences of their action.

B. *People v. Henderson,* a Court of Appeals Decision, Falls Far Outside the Scope of the Duress Rule the Defense Proposed Before the Circuit Court or on Appeal.

At each stage of this case, the defense has limited the relief it seeks to factual scenarios in which the accused did not know that the principle intended to kill or commit great bodily harm and did not themselves intend to kill or commit great bodily harm. The relief the defense seeks would be unavailable to a defendant who intentionally took a life. One such case is *People v. Henderson*,[18] a decision which the Court of Appeals Opinion quotes at length – nearly the entire second page of its Opinion.

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[17] *United States v. Gaudin*, 515 US 506, 510-11; 115 SCt 2310, 2313-14; 132 LEd2d 444 (1995) (J. Scalia citing Blackstone, Commentaries). *See also Alleyne v. United States*, 133 SCt 2151, 2154; 186 LEd2d 314 (2013) (Sixth Amendment right to jury trial requires that each element of a crime be proved to the jury beyond a reasonable doubt).

[18] *People v. Henderson*, 306 Mich App 1, 11–13; 854 NW2d 234, 241–42 (2014)

In *Henderson*, the defendant *knew* of the principle's intent to kill and he actively *participated* in the homicide. Henderson and his accomplices believed that the victim assaulted a friend, Robert Wright. While claiming that he only intended a fistfight, Henderson brought a handgun with him *knowing* that Wright wanted to kill those involved, and Henderson admitted that he was present at the shooting *and* had fired his gun.[19]

Henderson never addresses the issue raised in this appeal. Why is that? Because the rationale that animates the murder exception to the duress defense applies in *Henderson.* The rationale states that people cannot place more value on their own life than on the lives of others, and then claim duress when they *choose* to kill or help someone kill. That is what Henderson did. Reichard did nothing of the kind; she made no such *choice*. That is why the defense should be available to her and not to Mr. Henderson.

C. Ms. Reichard Never Chose to Take Anyone's Life.

The Opinion correctly noted that, "The rationale underlying the common law [murder exception to the duress defense] is that one cannot submit to coercion to take the life of a third person, but should risk or sacrifice his own life instead."[20]

But Reichard never *chose* to help Beatty take a life. She chose under duress to help him commit a robbery. The Opinion does not recognize the dissonance between the rationale for the murder exception, and the absence of any evidence that Reichard *chose* to take a life. Where the rationale for the rule does not apply, the rule should not apply.

This is true of each case cited in *Henderson* in the large block quote that comprises the second page of the Opinion. In *State v. Dissicini,*[21] the gruesome facts fit the rationale for the murder

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[19] *Id.*
[20] Court of Appeals Opinion at 2 citing *People v. Dittis*, 157 Mich App 38, 41; 403 NW23d 94 (1987)
[21] *State v. Dissicini*, 126 N.J. Super. 565, 567–69; 316 A.2d 12, 14–15 (App. Div. 1974), aff'd, 66 N.J. 411, 331 A.2d 618 (1975)

exception to the duress defense. That defendant belonged to a biker gang that killed a rival, Glen Renna. The evidence that he *chose* to help was abundant: He was present when the decision was made, when Renna was stabbed, and when Renna, still alive, was bound and gagged and placed in the trunk of a car; He rejoined his gang at a clubhouse where Renna was in "agony"; He helped dig Renna's grave and place Renna in it, and he fired a gun into the grave at Renna who may have been alive at the time.

The same is true of, *People v. Vieira*.[22] The defendant *knew* a homicide was planned and *himself* killed a victim.[23] The Ninth Circuit case cited in *Henderson*, *Annachamy v. Holder,*[24] never held that duress could not be a defense to murder. *Henderson* was citing to dicta in a footnote citing to non-analogous decisions, one of them *People v. Vieira*.

The issue the defense presents deserves better treatment than what we uncover in *Henderson*. Moreover, time has moved on from these decisions, and the trend, as discussed below, is toward reasonableness, not absolutism, in the application of the duress exception.

Moreover, each case cited by the prosecution suffered from the same flaw – those defendants *intended* to kill someone whereas Ms. Reichard was sitting in a car as ordered, unaware that Beatty had an intent to kill. The rationale for the murder exception to the duress defense is missing in Reichard's case, but it is present in those cases in which the accused made a *choice* to participate in taking a life in order to safeguard his own, regardless of whether he was acting under duress at the time. The defense has carefully pointed out this distinction before the trial court and on appeal. The cases cited by the Court of Appeals Opinion highlight the injustice of applying the murder exception to Reichard's trial.

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[22] *People v. Vieira*, 35 Cal. 4th 264, 273–76; 106 P.3d 990, 995–97 (2005), *as modified* (May 26, 2005)
[23] *Id.*
[24] *Annachamy v. Holder*, 733 F.3d 254, 260 (9th Cir. 2013), *overruled* by *Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014)

D. The Opinion Correctly Found the Issue Was One of First Impression.

The defense agrees with the Court of Appeals that the issue raised was one of first impression in Michigan.[25]

E. The Opinion Never Addresses the Unjust Outcomes and Jury Confusion Concerns.

The Opinion found "no logical reason" to allow the duress defense at this trial.[26] One logical reason is that where the rationale for the murder exception does not exist, the exception should not apply. Also, the Opinion never engaged with the inevitable perverse and unjust outcomes that will result, or the jury confusion, as discussed earlier in this brief. Instead, they took an unnecessary absolutist position.

F. The Opinion Confuses Direct Participation in a Homicide with the Broader Concept of "Aiding and Abetting."

In each case cited in the Opinion, the rationale for the murder exception to the duress defense applied – the defendant *chose* that someone would die in order to safeguard their own life. Those defendants were present when the murder occurred, actively participating in it. Those cases are fundamentally different from the case *sub judice,* where Reichard was sitting outside in a car hoping to get home alive that night, unaware of Beatty's intent. The two very different facts patterns warrant a different rule.

G. Felony Murder and Second-Degree Murder Are Meaningfully Different.

The Opinion finds an incongruity in precluding the duress defense where second-degree murder is charged on an aiding and abetting theory but allowing it in a felony murder case as argued by the defense in this appeal because, "…defendant's role as an aider and abettor has remained the same."[27] That seems to show an unintended misreading of the record. In any event, the defense reads the record differently.

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[25] Court of Appeals Opinion at 2.
[26] Court of Appeals Opinion at 3.
[27] Court of Appeals Opinion at 3.

If the predicate felony were not involved, Reichard's role as an aider and abettor would *not* be the same. In fact, it is unclear how the prosecution could argue liability for second-degree murder under if Reichard had not aided in the robbery. Moreover, only the existence of the predicate felony causes the punishment to become non-parolable life. If the accused did the predicate felony under duress, and without one of the first two forms of malice, there is no incongruity in allowing her the duress defense to the far more serious crime.

H. The Opinion Ends in Circular Reasoning.

The last section of the Opinion devolves into circular reasoning: 'To convict, the prosecutor will have to prove malice; if malice is shown the defendant is guilty of murder; Therefore, the defense is not allowed." The Opinion misses the central fact in this appeal – the rationale for the murder exception to the duress defense *does not exist in this record*; Reichard never chose to help the principle kill anyone.

V. Michigan Should Be a Leader In this Area of Law Not an Outlier

A. The *Merhige* Decision of This Court: Not On-Point But Impactful.

In a decision which has had a powerful impact on American law and which continues to be cited,[28] this Court, in *People v. Merhige*,[29] came close to addressing the issue before this Court. In *Merhige*, three men coerced the defendant into driving from Detroit to Grand Rapids for the purpose of robbing a bank. Like Reichard, the defendant waited outside while the men did the robbery, killing a bank customer in the process.

The Court held.

> Manifestly, if this defendant was acting under duress at the time, and prior to the robbery, such duress must affect to a greater or less degree his responsibility in the law for his acts.[30]

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[28] See e.g., Amicus Brief of Prosecuting Attorneys Association of Michigan, *People v. Robin Scott Duenaz*, 2015 WL 9943437 (Mich), 6-7.
[29] *People v. Merhige*, 212 Mich 601, 603; 180 NW 418 (1920) (unanimous opinion by J. Stone)
[30] *Id.,* at 610–11. Cf., *People v. Garcia,* 448 Mich 442; 531 NW2d 683 (1995)

The defense is *not* arguing that *Merhige* is on-point with the case *sub judice*. But neither party in this appeal has found a case in which this Court has come any closer to deciding the issue now before it.

B. Other Courts Have Extended *Merhige* To The Issue On Appeal.

The impact *Merhige* has had on American law has been significant. The treatise, LaFave, Substantive Criminal Law, cites *Merhige* and rejects the idea that duress can never be a defense to a charge of felony murder:

> [D]uress is no defense to the intentional taking of life by the threatened person; but it is a defense to a killing done by another in the commission of some lesser felony participated in by the defendant under duress.[31]

In Perkins on Criminal Law, we find the same statement of law:

> Another unsound suggestion, occasionally encountered, is that compulsion cannot be recognized as an excuse in a prosecution for felony murder even if the defendant did not do the killing himself and joined others in their wrongdoing only to save his life.[32]

Outside Michigan, *Merhige* has been cited in support of the proposition that duress, in limited circumstances, can serve as a defense to felony murder.[33] Influenced by *Merhige*, the majority of states, in either their case law or statutory law, do not hold an absolutist bar to a duress defense in all cases of felony murder.

C. The Majority of States Allow a Duress Defense to Unintended Felony Murder.

Increasingly, to mitigate the harsh impact of felony murder theories, non-intentional felony murder (where the accused did not intend for a death to occur) has become a recognized exception to the general rule that duress is not a defense to murder.

The State of Florida

Under Florida criminal law, where a defendant has presented sufficient evidence to support a

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[31] LaFave, Substantive Criminal Law, Section 5.3(b) at 618 (West Publishing Company 1986)
[32] Perkins, Criminal Law, Ch. 9, Sec.2(c) "Compulsion" (The Foundation Press, Inc. 1969)
[33] See, *Wright v. State*, 402 So.2d 493, 498-9 n.8 (Fla.3d DCA 1981)

duress defense to the predicate felony, the defendant is entitled to the duress instruction as a defense to felony murder.[34]

The State of Maryland

Under Maryland criminal law, duress can be a defense to felony murder:

> At common law, the rationale for barring the duress defense in a prosecution for murder was that a person 'ought rather to die himself than escape by the murder of an innocent.' 5 Blackstone's Commentaries 30. This rationale disappears when the sole ground for the murder charge is that the defendant participated in an underlying felony, under duress, and the defendant's co-felons unexpectedly killed the victim, thereby elevating the charge to felony murder.[35]

The State of California

Under California criminal law, "If one is not guilty of the underlying felony due to duress, one cannot be guilty of felony murder based on that felony."[36]

The State of Ohio

Ohio appears to allow the duress defense to mitigate the degree of the murder, "[I]f duress is a valid defense to the underlying felony in a felony-murder trial, a defendant can be convicted of murder, but not of aggravated murder."[37]

Other Jurisdictions

The prosecution's position has been widely rejected in jurisdictions that nonetheless affirm the rule that duress is not a defense to *intentional* murder. As shown elsewhere in this brief, the public policy behind the 'murder exception' to the duress defense is sound only where the accused *intended* for a homicide to occur as a means to save their own life. Several states allow the duress defense to reduce a charge from murder to manslaughter.[38]

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[34] *Rodriguez v. State*, 174 So.3d 502 (2015) (District Court of Appeal of Florida)
[35] *McMillan v. State,* 428 Md 333, 51; A3d 623, 634-635 (2012) (quotations omitted)
[36] *People v. Fiore*, 227 Cal App 4th 1362, 1379 (2014) citing *People v. Anderson*, 28 Cal 4th 767, 772, 784; 122 Cal Rptr 2d 587; 50 P3d 368 (2002)
[37] *State v. Getsy*, 702 NE2d 866 (Ohio 1998), *State v. Woods*, 48 Ohio St.2d 127, 135; 2 O.O.3d 289, 293; 357 NE2d 1059, 1065 (1976)
[38] Ariz. Rev. Stat. Ann. § 13-1103(A)(4); Minn. Stat. Ann. § 609.20(3); Wis. Stat. Ann. § 939.46(1)

States that allow a duress defense to the predicate felony to serve as a defense to felony murder include: Kansas, Kentucky, New Jersey, New Mexico, North Caroline, Oklahoma, and Virginia.[39] Michigan could easily adopt the same rule.

A number of states have enacted legislation that generally recognizes duress as a defense to *any* felony charge, including the states of New York, Pennsylvanian, and Texas.[40] That is seen in the case law of other states.[41] Few states have adopted the prosecution's absolutist position: Alabama, Indiana, Montana, Nebraska, and Washington.[42] A greater number have apparently not reached the issue: Georgia, Idaho, Iowa, Louisiana, Main, Mississippi, New Hampshire, Oregon, Rhode Island, South Carolina, Vermont, West Virginia, Wisconsin.

Great Britain, the source of our common-law rules regarding the duress defense, has held that while the defense is not available for the actual killer, it can be asserted by other defendants involved in the crime.[43]

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[39] *State v. Hunter,* 241 Kan 629, 740 P2d 559, 569 (1987) (where compulsion is a defense to an underlying felony so that felony is justifiable, compulsion is equally a defense to charge of felony murder); *Bennett v. Com*., 978 SW2d 322, 326 (Ky. 1998); *State v. Bond*, No. A-2317-14T3, 2017 WL 4655083, at *7 (N.J. Super. Ct. App. Div. Oct. 18, 2017); *State v. Sloan*, No. S-1-SC-34858, 2016 WL 3564360, at *1 (N.M. June 23, 2016) citing *State v. Nieto*, 2000-NMSC-031, 129 NM 688, 693; 12 P3d 442, 447 (2000); *State v. Clodfelter*, 203 N C App 60, 68; 691 SE2d 22, 27 (2010) (acquittal on underlying felony is acquittal on felony murder charge); *Tully v. State,* 730 P.2d 1206, 1210 (Okla Crim App1986) ("limitation to the duress defense is restricted to crimes of intentional killing, and not to felony murder"), and *Arnold v. Commonwealth,* 37 Va App 781; 560 SE2d 915, 918 (2002) (recognizing the felony murder exception to the general rule that duress is not available as a defense to murder)

[40] Alaska Stat. § 11.81.440; Ark Code Ann § 5-2-208; Conn Gen Stat Ann § 53a-14; Del Code Ann Title 11, § 431; Haw Rev Stat. § 702-231; N Y Penal Law § 40.00; N D Cent Code § 12.1-05-10; Nebraska NRS 200.035(2)-(5); Pa Cons Stat Ann. Title 18, § 309; S D Cod Laws § 22-5-1; Tex Penal Code Ann § 8.05; Utah Code Ann § 76-2-302.

[41] *Com. v. Vasquez*, 462 Mass 827, 835; 971 NE2d 783, 792 (2012), *Com. v. Pike*, 431 Mass 212, 222–23; 726 NE 2d 940, 948–49 (2000), *Mims v. State*, No. W201600418CCAR3PC, 2017 WL 764593, at *6 (Tenn Crim App Feb. 24, 2017), *appeal denied* (June 9, 2017)

[42] *Boyd v. State,* 715 So2d 825 (1997), *Moore v. State*, 697 NE 2d 1268, 1273 (Ind Ct App 1998), *State v. Lingle*, 140 SW3d 178, 187–88 (Mo Ct App 2004), *State v. Perkins*, 219 Neb 491, 499; 364 NW2d 20, 26 (1985), *State v. Mannering*, 112 Wash App 268, 275; 48 P3d 367, 371 (2002), *aff'd*, 150 Wash 2d 277, 75 P3d 961 (2003)

[43] See *Regina v. Howe*, [1987] 1 A.C. 417, 427 (H.L.) (Eng.)

D. On Earlier Michigan Cases that Address Duress and Felony Murder.

Before the trial court and Court of Appeals, the prosecution relied on a set of published and unpublished decisions in which the relevant facts are wildly unlike those presented in this case. The limited rule the defense seeks would never impact such cases. Set in contrast to this case, these cases show how unreasonable it is to apply to Reichard the same murder exception to the duress defense.

People v. Dittis **(Mich App 1987)**

In *People v. Dittis,*[44] the defendant was convicted of first-degree murder arising from the killing of Albert J. Jasenas. The opinion tells us that, as Jasenas returned home, he was struck from behind with a pipe wrench *held by the defendant*. An accomplice then stabbed Jasenas in his back while Dittis did nothing to intervene. At trial, Dittis admitted his involvement, but contended that his accomplice forced him to participate by threats of death if he did not.[45] Unlike the case *sub judice,* Dittis *participated* in the killing.

People v. Etheridge **(Mich App 1992)**

In *Etheridge*,[46] we find a set of facts wildly unlike those in the case *sub judice.* In *Etheridge*, a man named Sanders joined a woman named Cross in her apartment, and told Cross that he was going to kill a man named Mercer. Mr. Etheridge then arrived and, *knife in hand*, began cursing at Mercer who plead for his life. Cross fled the scene but later watched Sanders *and* Etheridge placing a bound Mercer into the trunk of a car. Later, she heard Etheridge, Sanders, and a third man discuss "logs and why the body would not come back up." Mercer's body was thereafter found in a canal near the Detroit River.[47] Again, unlike the accused in the case *sub judice*, defendant *participated* in the killing.

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[44] *People v. Dittis,* 157 Mich App 38; 403 NW2d 94 (1987)
[45] *Id.,* 157 Mich App at 39–40.
[46] *People v. Etheridge*, 196 Mich App 43; 492 NW2d 490 (1992), lv. den. 447 Mich 1012 (1994)
[47] *Id.,* 196 Mich App at 45–46.

People v. Gimotty **(Mich App 1996)**

In *Gimotty,*[48] the defendant, an accomplice to a larceny, fled police at a high-speed, failed to stop at a red-light, and struck and killed a three-year-old.[49] Gimotty *participated in* the homicide – he was the driver who killed the victim.

People v. Carp **(Unpublished Mich App 2008)**

The *Carp* decision is radically unlike the case *sub judice*.[50] Mr. Carp actively participated in violently killing someone.[51]

People v. Harris **(Unpublished Mich App 2010)**

In *Harris,*[52] the defendant intended to give the victim a ride but, after *realizing that his friends intended to kill* the victim, he still proceeded to pick-up the victim and, after the victim entered the car, he was shot in Harris' presence. Harris helped dispose of the victim's body and took money obtained during the murder. The opinion even tells us that Harris never claimed that he had acted under duress.[53]

In dissent, Judge Shapiro noted a troubling aspect of the statutory requirement which mandates the same sentence for aiding and abetting a murder as for the murder. Observing that the threshold for aiding and abetting is very low, Judge Shapiro wrote:

> Someone convicted of aiding and abetting a first-degree murder must be sentenced to life without parole no matter how minor his role or the degree to which he hoped the crime would not actually come to fruition. For this reason, I conclude that there is a significant conflict between the principle of proportionality and MCL 767.39 where the primary actor's crime was first-degree murder.[54]

And Judge Shapiro made an observation applicable to Reichard:

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[48] *People v. Gimotty*, 216 Mich App 254; 549 NW2d 39, 40–41 (1996)
[49] *Gimotty*, 216 Mich App at 256–57.
[50] *People v. Carp*, No. 275084, 2008 WL 5429890, at *1–3 (Mich COA Dec. 30, 2008)
[51] *Id.*
[52] *People v. Harris*, No. 287724, 2010 WL 2925380, at *1 (Mich COA July 27, 2010)
[53] *Id.*
[54] *Id*.

> An individual who is threatened with serious harm by a potential murderer if he does not provide requested or commanded assistance should not have to choose between being a dead hero and being deemed just as guilty as the actual murderer and spending his life in prison without the possibility of parole.[55]

Reichard did not know it at the time, but her choice was between her own death and serving life without parole. This is an unreasonable and unfair choice. The murder exception to the duress defense was designed instead for people faced with death to themselves or death to another person, and choose the later.

People v. Tull **(Unpublished Mich App 2015)**

People v. Tull[56] is wildly unlike the case *sub judice.* Tull and his associate pulled the victim into a bedroom and threatened her. Both men placed a paper bag over her head before escorting her to Tull's car. Men matching the descriptions of Tull and and his associate were later seen filling gas containers at a gas station and the victim was killed and her body burned.[57] That Tull was not allowed a duress instruction in no way illuminates whether a duress instruction should be allowed in the case *sub judice.*

VI. The Court of Appeals Opinion Denies Defendant Her Right to Present a Defense

Under the Court of Appeals Opinion, Ms. Reichard is denied her federal and state constitutional right to present a defense at trial.[58] The United States Supreme Court has specifically recognized that there are few rights more fundamental than the right to present a defense.[59] The right to present a defense under the Fifth and Sixth Amendments entitles a defendant to a jury instruction on any recognized defense for which there is evidentiary support.[60] The defense acknowledges that the issue in the present case is whether the defense is recognized.

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[55] *Id.*
[56] *People v. Tull*, No. 321815, 2015 WL 6087191, at *1 (Mich COA Oct. 15, 2015)
[57] *Id.,* at *7.
[58] *People v. Anstey,* 476 Mich 436, 460; 719 NW2d 579 (2006)
[59] *Chambers v. Mississippi*, supra., 410 US 284 (1973).
[60] *Mathews v. United States*, 485 US 58 (1988)

The United States Supreme Court has held that jury instructions should convey the requisite consciousness of wrongdoing.[61] Only the duress defense covers Reichard's theory as to why her involvement in this matter falls short of the requisite consciousness of wrongdoing that is required for a guilty finding on a murder charge.

VII. Conclusion

While the murder exception to the duress defense shows admirable respect for human life, it is misapplied to cases of *unintentional* felony murder. In such cases, the rationale for the rule does not exist – Reichard never *chose* to kill or commit great bodily harm or to *help* the principle kill or commit great bodily harm. The duress defense should be allowed as to the predicate felony and to rebut the third form of malice. If Reichard was under *duress*, she was not behaving in a *willful or wanton disregard* of consequences.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellant, Tiffany Reichard, respectfully requests that this Court grant leave to appeal on the issue presented or, in lieu of granting leave to appeal, grant peremptory relief holding that the duress defense may be raised against a felony murder charge where the accused did not intend to kill or commit great bodily harm and did not know that the principle intended to kill or commit great bodily harm.

Respectfully submitted,

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[61] *Arthur Andersen, LLP. v. United States*, 544 US 696 (2005)